

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Richmond Division

MITCHELL PERKINS,

Plaintiff,

v.

Case No. 3:10CV00449

THE BANK OF NEW YORK MELLON, et. al.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO QUASH

The Honorable Joi Taylor, by counsel and pursuant to Rule 12(b) (5) of the Federal Rules of Civil Procedure, respectfully submits the following memorandum in support of her motion to quash the alleged service of process.

I. INTRODUCTION

Mitchell Perkins filed an amended petition against Judge Taylor as well as several other defendants. On August 11, 2010 Perkins returned a copy of the summons to the court along with a certified mail receipt showing that someone other than Judge Taylor signed for the letter.

II. ARGUMENT

Service on Judge Taylor should be quashed and the plaintiff's amended petition against her dismissed for insufficient service pursuant to Fed. R. Civ. P. Rule 12 (6)(5) because the complaint has not been served on Judge Taylor as directed by Fed. R. Civ. P.

Rule 4(e) and the alleged service return does not comply with Fed. R. Civ. P. Rule 4 (1)(1).

Rule 4 (e) of the Federal Rules of Civil Procedure requires that an individual be served either by personal service, leaving service with someone of suitable age at the place of abode, or through service on a designated agent. Rule 4 (e) also allows for service in accordance with state law. In addition to the above methods, Virginia also allows for service by posting at the place of abode. Va. Code § 8.01-296(2)(b). A certified mailing signed for by someone other than the defendant is not provided for as sufficient service of process under either the Federal Rules of Civil Procedure or Virginia law.

Under the Federal Rules of Civil Procedure and Virginia law, a plaintiff may ask the defendant to waive service. Fed. R. Civ. P. (4) (d); Va. Code § 8.01-286.1. If the defendant agrees to waive service then it is not necessary for the plaintiff to actually have the complaint served so mailing the complaint is sufficient. However, as a waiver was never requested of Judge Taylor, she never waived service.

Finally, Rule 4 (1) (1) provides that proof of service must be made by a server's affidavit. However, there is no affidavit of service in this matter as the plaintiff has simply returned to the Court a copy of the summons and the certified mail receipt. Therefore, the alleged service return filed with the Court is insufficient.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the defendant, the Honorable Joi Taylor, respectfully requests that this Court grant her motion to quash and dismiss the amended petition for insufficient service.

IV. "ROSEBORO NOTICE"

Consistent with the requirements of *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the following advises the *pro se* plaintiff herein, Mitchell Perkins, that:

(1) he has the opportunity to file a response opposing the Motion to Quash. Any such response must be filed within twenty (20) days of the date on which the Motion to Quash was filed;

(2) the Court could dismiss this action on the basis of the Defendant's moving papers if he does not file a response;

(3) he must identify all facts stated by Defendant with which he disagrees and must set forth his version of the facts by offering affidavits (written statements signed before a notary public under oath) or by filing sworn statements (bearing a certificate that is signed under penalty of perjury); and

(4) he also is entitled to file a legal brief in opposition to the one filed by the Defendant herein.

Respectfully submitted,

THE HONORABLE JOI TAYLOR

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CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of August 2010, I will electronically file the foregoing with the clerk of the court using the CM/ECF system and sent a true copy via U.S. Mail to the following:

Mitchell Perkins
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Pro se plaintiff

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